EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

JUN 19 PAGE 15

No. 85-6593 (3)

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

EARL ALLEN,

Petitioner,

v.

DR. STEPHEN L. HARDY and
NEIL F. HARTIGAN, Attorney General of Illinois,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA JONES STEWART
Solicitor General
State of Illinois

MARK L. ROTERT,* Chief
Criminal Appeals Division
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondents.

* Counsel Of Record.

13 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in Barefoot v. Estelle, 463 U.S. 880 (1983) already offers adequate guidance to courts of appeals on the standards which govern the issuance of certificates of probable cause pursuant to 28 U.S.C. § 2253?

2. Whether Petitioner procedurally defaulted on his claim that the prosecution's conduct in selecting jurors at his trial in the state court denied Petitioner rights assured by the Equal Protection Clause?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS	1
REASONS WHY THE PETITION SHOULD BE DENIED:	
I.	
THE COURT OF APPEALS DID NOT DEPART FROM THIS COURT'S TEACHINGS IN BAREFOOT v. ESTELLE BY DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF PROBABLE CAUSE TO APPEAL	2
II.	
THE DISTRICT COURT CORRECTLY APPLIED THIS COURT'S PRECEDENTIAL AUTHORITY GOVERNING THE CONCEPT OF PROCEDURAL DEFAULT	5
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983)	5
Batson v. Kentucky, ____ U.S. ____, 39 Cr. L. Rptr. 3061 (No. 84-6263; cert. granted reported at 105 S.Ct. 2111 (1985))	4
Engle v. Isaac, 456 U.S. 107 (1982)	3,4,6
Lockhart v. McCree, ___ U.S. ___, 39 Cr. L. Rptr. 3085 (No. 84-1865, 5/5/86)	5
People v. Allen, 96 Ill. App. 3d 871, 422 N.E.2d 100 (1st Dist. 1981)	2
Reed v. Ross, ___ U.S. ___, 104 S.Ct. 2901 (1984)	7
Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338 (1984)	8
Stewart v. Beto, 454 F.2d 268 (5th Cir. 1971) cert. denied, 406 U.S. 925 (1972)	5
Swain v. Alabama, 380 U.S. 202 (1965)	3
United States ex rel. Veal v. DeRobertis, 693 F.2d 642 (7th Cir. 1982)	3,6
Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617 (1985)	7

No. 85-6593

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

EARL ALLEN,

Petitioner,

v.

DR. STEPHEN L. HARDY and
NEIL F. HARTIGAN, Attorney General of Illinois,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Omitted pursuant to this Court's Rule 34.2.

JURISDICTION

Omitted pursuant to this Court's Rule 34.2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

For reasons detailed herein, Respondents dispute Petitioner's assertion (at page 3 of his petition) that either the sixth or the fourteenth amendments are directly implicated by the lower court rulings in his case.

Respondents do agree that the petition raises issues under 28 U.S.C. § 2253, the text of which is set forth in the petition. Id.

STATEMENT OF FACTS

A complete summary of Petitioner's underlying criminal offenses is found in the opinion affirming his conviction on direct appeal; People v. Allen, 96 Ill. App. 3d 871, 422 N.E.2d 100 (1st Dist. 1981). Facts relevant to Petitioner's experiences seeking habeas corpus relief are fully detailed in the four (4) opinions rendered by the district court in his case, which are included in the Appendix to the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS DID NOT DEPART FROM THIS COURT'S TEACHINGS IN BAREFOOT v. ESTELLE BY DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF PROBABLE CAUSE TO APPEAL.

As is suggested by the fact that the district court published no fewer than four (4) separate opinions in regard to Petitioner's request for habeas corpus relief, this case has taken a rather tortuous path through the courts below. Specifically, Petitioner has asserted (see, the Appendix to the Petition, page App.-13, fn. 1), then abandoned (id.), then re-asserted (App.-20) constitutional arguments regarding the selection of the jury which initially convicted him of murder. His jury selection claims have been styled under both the sixth amendment (App.-20) and the Equal Protection Clause. (App.-16-18)

Notwithstanding these various changes in strategy and approach, the district court ably and carefully analyzed the pleadings and amended pleadings of the parties and concluded that:

> 1.) To the extent that Petitioner sought habeas corpus relief under the Equal Protection Clause, his procedural default in the Illinois courts precluded federal consideration of such a claim by means of 28 U.S.C. § 2254 (App.-14);
>
> 2.) To the extent that Petitioner sought relief under a theory that the fair cross-section analysis of the sixth amendment should be applied to individual petit juries, his theory was not yet the law of the land for purposes of a federal constitutional decision on habeas corpus (App.-21).

Both these rulings were (and are) entirely correct. As such, the district court was correct in its decision to refuse the certificate of probable cause, and the court of appeals was justified in its refusal to overturn that ruling.

Respondents do not dispute that, at his trial in the Illinois courts, Petitioner complained that the prosecutor had used peremptory challenges to exclude blacks and Latinos from his jury. See, People v. Allen, 96 Ill. App. 3d 871, 422

N.E.2d 100, 103-04 (1st Dist. 1981). But it is equally clear that on direct appeal, Petitioner disavowed any effort to demonstrate that this conduct by the prosecution denied him equal protection under the doctrine of Swain v. Alabama, 380 U.S. 202 (1965):

> (a)lthough [Allen] alleges that the prosecution's actions constituted a violation of the fourteenth amendment, it is clear that he has failed to establish the kind of systematic exclusion required by Swain. Recognizing this, [Allen] argues that Swain "needs to be reexamined in view of recent case law to the contrary", and urges us to adopt the reasoning of the California Supreme Court in People v. Wheeler, (1978) 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748. The Wheeler court, relying on the California Constitution, held that the State's use of peremptory challenges based solely on group affiliation violated the defendant's right to a fair and impartial jury drawn from a representative cross-section of the community.

People v. Allen, supra, 422 N.E.2d at 104-05 (emphasis supplied).

Put another way, Petitioner objected to the jury-selection process in his case, made no real effort to marshal those facts required by then-existing precedent to support his claim, and on appeal sought to persuade the Illinois court that it could excuse such failure by abandoning its own precedent and that of this Court. This the Illinois court declined to do. Id.

Subsequently, Petitioner attempted to resurrect his Swain/equal protection claim on habeas corpus review, asking that the federal district court give him the opportunity to collect the very evidence which he neglected to present to the Illinois court. (App.-14) However, Respondents urged that Petitioner had defaulted on this claim, relying upon Engle v. Isaac, 456 U.S. 107 (1982). They noted that, under United States ex rel. Veal v. DeRobertis, 693 F.2d 642 (7th Cir. 1982) Allen's counsel was, at a minimum, required to make an offer of proof on the claim, offering at the very least counsel's verbal assertion that the facts necessary to support an equal protection claim would be presented if the trial court would so allow. Even this simple procedure had not been followed. (App. 14)

The district court agreed, holding that "(t)o preserve the Swain issue for a reviewing court, Allen's trial counsel should have made some showing of exclusion of minorities over time. Absent that proof, the reviewing court had no predicate for reversing the trial court's decision." Id. (emphasis supplied). The district court then proceeded to apply the teachings of Engle v. Isaac by directing the parties to brief the question of whether "cause" existed for that procedural default. When Petitioner was unable to establish adequate "cause", his request for relief on equal protection grounds was denied. (App. 15-18)

Petitioner then switched his analysis, urging his (previously abandoned) theory that the sixth amendment should be construed to require application of the fair cross-section analysis to the composition of individual petit juries. (App. 20) Recognizing this theory to be contrary to the prevailing weight of authority, the district court denied relief on those grounds as well. Three weeks later, after the Seventh Circuit Court of Appeals had twice rejected similar sixth amendment analyses, the district court issued a Supplemental Opinion reconfirming its adherence to these authorities. (App. 21*)

In view of these facts, Respondents disagree with the intimation that the Seventh Circuit should have issued the certificate of probable cause merely because this Court had granted certiorari in the case Batson v. Kentucky, ____ U.S. ____, 39 Cr. L. Rptr. 3061 (No. 84-6263; cert. granted reported at 105 S.Ct. 2111 (1985)). The issues to be raised by the Petitioner's putative appeal could only have been:

> 1) under the Seventh Circuit's own precedent in the Veal case, was Allen's failure to make an offer of proof or to produce any greater evidentiary basis for his claim in the state courts a procedural default which barred him from presenting such evidence to a federal habeas corpus court?

---

* Petitioner's Appendix has two (2) pages marked "App. 21"; this citation intends to refer to comments made on both pages, noted as being 586 F. Supp. 105-06.

2) was there reason to believe that the fair cross-section analysis of the sixth amendment should be extended to govern the composition of an individual petit jury?

Nothing in the Batson case, either as presented in the certiorari papers or as decided by this Court, dealt with the procedural default issue presented by question number one. As to the second question, there was no reason to conclude that this Court would ultimately answer that question affirmatively, and the Court has in fact rejected that proposition only this Term. Lockhart v. McCree, ___ U.S. ___, 39 Cr. L. Rptr. 3085, 3088 (No. 84-1865, 5/5/86).

In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 3394 (1983) this Court discussed certificates of probable cause to appeal denials of federal habeas corpus relief. This Court concluded "that a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" Id., quoting Stewart v. Beto, 454 F.2d 268, 270, n.2 (5th Cir. 1971) cert. denied, 406 U.S. 925 (1972). Nothing done by the court of appeals (or, for that matter, by the district court which initially refused to issue the certificate (App. 22-23)) in this case departs from that standard. The underlying decisions at issue here, while complicated by Petitioner's alternative litigation strategies, are nonetheless sound applications of existing precedent issued by this Court. Because Petitioner makes no suggestion that different or substituted authority is needed, and because he is incorrect in alleging that existing precedent was not followed, his petition for certiorari should be denied. Rule 19, Rules of the United States Supreme Court.

II.

THE DISTRICT COURT CORRECTLY APPLIED THIS COURT'S PRECEDENTIAL AUTHORITY GOVERNING THE CONCEPT OF PROCEDURAL DEFAULT.

Petitioner further alleges that his habeas corpus claim was dismissed on the basis of a "novel waiver rule" which should be inapplicable where, "as here, the state courts have addressed the merits" of his constitutional claim. Petition, page 7. However, neither allegation is correct.

In an Illinois trial court, a defendant's failure to make an adequate offer of proof detailing facts in support of a claimed deprivation of constitutional rights is a procedural default, and such a default bars that defendant from later seeking to establish those facts in support of a petition for writ of habeas corpus. United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 649-50 (7th Cir. 1982). As the district court found in this case (App. 14) Petitioner committed such a procedural default during his proceedings in the Illinois court system; having presented no adequate showing of "cause" for his default, the Petitioner was, therefore, not entitled to federal habeas corpus relief. App. 16-18.

The doctrine set forth in the Veal case is entirely consistent with the logic of this Court's pronouncements on procedural default and the overriding precepts of comity; cf., Engle v. Isaac, 456 U.S. 107 (1982). If it is appropriate to require a petitioner to present his constitutional claim to the state court before allowing consideration of that same claim on collateral review, it is manifestly appropriate to also require the petitioner to present to the state court all those facts which the Petitioner knows (or, with the exercise of due diligence, should know) to be in support of his claim. Particularly where this requirement can be readily met by means of such a well-established device as an offer of proof, the requirements of the Veal case are neither novel nor burdensome. Moreover, they directly coincide with the comity considerations which underlie the procedural default doctrine.

In a related vein, Respondents take issue with the Petitioner's unqualified assertion that the Illinois Appellate Court "addressed the merits" of his claim. The district court was faced with a similar assertion:

> . . . Allen contends no procedural default bars habeas relief because the Appellate Court considered Allen's claim on its merits.
>
> Not so. All the Appellate Court decided was that no record evidence supported Allen's claim under the Swain analysis, held applicable to both his Sixth and his

> Fourteenth Amendment claims. Indeed that was all the Appellate Court could do, given the lack of record evidence and its refusal to change the constitutional test. . . . If there is to be any meaning to the notion a failure to offer evidence can be a state procedural default, no "forgiveness" of that default can be found in the Appellate Court's affirmance of the trial court based upon the lack of such evidence.
>
> In short Allen's failure to attempt any prima facie Swain showing prevented the Appellate Court's decision about the absence of such a showing from being a determination "on the merits." In that context the Appellate Court cannot be deemed to have "forgiven" Allen's failure to proffer evidence.

App. 15 (citations omitted, emphasis in original.)

Finally, two citations by Petitioner (Petition, p. 8) merit comment. Citing Reed v. Ross, ___ U.S. ___, 104 S.Ct. 2901 (1984) Petitioner apparently seeks to excuse his procedural default by claiming that the offer of proof couldn't have been made by a counsel who did not know that minorities were being systematically excluded from Illinois juries. Although Respondents deny that Illinois prosecutors racially discriminate against minority veniremen, Petitioner's argument still misses the mark. Allen's counsel apparently saw something which suggested possibly discriminatory intent. Having raised the issue, surely counsel could be expected to know of the then-valid decision in Swain and its evidentiary requirements. Thus, nothing in Reed v. Ross excuses his total failure to make any effort to meet those requirements.

Petitioner's citation of Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617 (1985) is equally inapposite. To the extent that Vasquez discusses the concept of exhaustion of remedies and construes 28 U.S.C. § 2254, Rule 7, it does not address the analytically discrete procedural default issues discussed by the district court in petitioner's case. In Vasquez, a district court ruled that petitioner had been afforded no full and fair opportunity to litigate the facts supporting his claim, and ordered additional discovery to supplement those facts already found by the state court. Id.,

106 S.Ct. at 625 (O'Connor, J., concurring). By contrast, any inadequacy in the factual record of Petitioner's case is solely the product of his procedural default in the Illinois courts, and is thus attributable only to him.

Finally, Respondents believe they would be remiss in overlooking the timing of this Petition, or the fact that the Court's subsequent decision in Batson, at first blush, seems to address contentions raised by Petitioner at his trial for murder. However, Respondents insist again that this is ultimately a procedural default and sixth amendment case, and that those areas of law are all that could remain for review by this Court. In any event, for reasons persuasively stated by Mr. Justice Powell in his concurring opinion in Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 1346-48 (1984), Respondents submit that Batson is inapplicable to Petitioner's case as it exists on collateral review.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition For Writ Of Certiorari in this case.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA JONES STEWART
Solicitor General
State of Illinois

MARK L. ROTERT,* Chief
Criminal Appeals Division
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondents.

* Counsel Of Record.

No. 85-6593

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

EARL ALLEN,

Petitioner,

v.

DR. STEPHEN L. HARDY and
NEIL F. HARTIGAN, Attorney General of Illinois,

Respondents.

CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Mark L. Rotert, a member of the bar of this Court and representing Respondents in this cause, certify:

1.) That I have served ten (10) copies of the Respondents' Brief In Opposition on the below-named party, by mailing such copy by means of Express Mail through the United States Post Office located at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

Kenneth N. Flaxman
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603

I further state that this mailing took place on June 16, 1986, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
MARK L. ROTERT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

SUBSCRIBED and SWORN to
before me this 16th day of
June, 1986.

_____
NOTARY PUBLIC